FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 93-152

In The

Supreme Court of the United States

October Term, 1993

RICHARD C. WALL,

Petitioner,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D.G. Ribble, Counsel of Record
Wilford H. Stone
Lynch, Dallas, Smith & Harman, P.C.
526 Second Avenue SE
P.O. Box 2457
Cedar Rapids, IA 52406-2457
(319) 365-9101

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Should a writ of certiorari be granted to decide the hypothetical question of whether the lower courts' rulings might have been different under a proposed amendment to Federal Rule of Civil Procedure 4(j)?

2. Whether a writ of certiorari should be granted to review the district court's exercise of discretion in finding as a fact, affirmed by the court of appeals, that good cause was not shown.

PARTIES TO THE PROCEEDING

The names of the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are stated in the caption of the case in this Court. Rockwell has no parent company and the only subsidiary company not wholly owned in which it has an interest is Automotive Axles, Ltd.

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STATEMENT OF THE CASE

Mr. Wall correctly states that written settlement proposals were exchanged before the complaint was filed August 6, 1991. (Pet. 4). However, after that there were no ongoing settlement discussions or negotiations. (App., *infra*, 1, 2).

August 6, 1991, Wall's attorney, Mr. Visser, wrote to Rockwell's attorney, Ribble, and enclosed a copy of the complaint he filed that day. In his letter Visser stated:

> "We have not yet made any decisions about when and whether to serve the Complaint, which I understand we need to do within 120 days." (App., *infra*, 3).

Pursuant to a request in that letter, Rockwell gathered statistical information and provided it to Visser October 22. That day Visser wrote to Wall stating he had received the data and:

> "As you can see from the statistical breakdown, it appears that the company managed to keep the numbers fairly close in this respect as well.
>
> I think we need to sit down and re-evaluate the status of the case, actions that may be taken, expenses, etc., no later than the middle of November." (App., *infra*, 5).

December 30, 1991, the clerk filed a notice of dismissal. In the application in resistance to the dismissal, filed by Visser January 7, 1992, he stated:

> "Counsel for the plaintiff has only recently determined that it will be unable to continue in its representation of the plaintiff." (App., *infra*, 7).

There had been no communication between counsel after October 22, 1991, *until Rockwell's attorneys* received the service copy of Wall's resistance filed January 7, 1992. (App., *infra*, 1, 2).

SUMMARY OF THE ARGUMENT

Wall's statement of the "REASON FOR GRANTING THE PETITION" (Pet. 6) does not assert a special and important reason to grant the writ, as required by Rule 10.1.[1]

Wall's alternative argument, that "the circumstances of this case warrant the exercise of a court's discretion" to find good cause (Pet. 12), is not reason to grant the writ. The district court's exercise of discretion in finding as a fact that good cause was not shown, affirmed by the court of appeals, is not a special and important reason for this Court to grant the writ. This is particularly true absent a claim of abuse. Furthermore, the finding of lack of good cause is completely supported by the record.

ARGUMENT

A. The proposed amendment to Federal Rule of Civil Procedure 4(j) does not raise a special and important question in this case that should be settled by this Court.

The lower courts decided this case under Federal Rule of Civil Procedure 4(j). The only reason Wall asserts

[1] Every court of appeals decision cited by Wall supports the rulings of the lower courts in this case.

for granting the writ is the proposed amendment to that rule. This Court adopted the amendment and any further pronouncement on the matter would be redundant. The question of whether the lower courts' rulings might have been different under the proposed rule is hypothetical, pending action by Congress. In any event it is not an important question of federal law because the answer could benefit only Wall individually and not the public.[2]

B. The district court's factual finding that Wall failed to show good cause, affirmed by the court of appeals, was correct, and a writ should not be granted to review it.

Wall does not claim an abuse of discretion in the district court's finding. He only asserts that "the circumstances of this case warrant the exercise of a court's discretion" to find good cause. The circumstances he recites are ongoing settlement negotiations, actual notice of filing the complaint, lack of prejudice, fault of the clerk and running of the statute of limitations. (Pet. 12).

As the district court correctly observed:

> "Plaintiff has offered reasons why this court should allow the case to proceed. But plaintiff has not offered any reasons why defendant was not served within the period provided by the Rule." (Pet. App. 4a).

---

[2] " . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Wall now implies as a reason that Rockwell wrongfully participated in "on-going settlement negotiations" and then relied on "an exceedingly formalistic interpretation" of the rule. (Pet. 12, 13). Apart from the doubtful persuasive value of such a claim, it is unfounded.

There was an exchange of written settlement proposals July 29 and August 5 and Rockwell provided requested statistics October 22, 1991. However, there were no settlement negotiations after the complaint was filed August 6, 1991. (App., *infra*, 1, 2).

The probable reason that service was not made is that Visser could not decide whether to do it. He wrote to Ribble when he filed the complaint:

> "We have not yet made any decisions about when and whether to serve the Complaint, which I understand we need to do within 120 days." (App., *infra*, 3).

October 22, when Rockwell delivered the statistics to Visser, he continued to deliberate whether to pursue the case. He wrote to Wall:

> "As you can see from the statistical breakdown, it appears that the company managed to keep the numbers fairly close in this respect as well.
>
> I think we need to sit down and re-evaluate the status of the case, actions that may be taken, expenses, etc., no later than the middle of November." (App., *infra*, 5).

January 7, 1992, in Wall's resistance to dismissal, Visser stated:

> "Counsel for the Plaintiff has only recently determined that it will be unable to continue in

its representation of the Plaintiff." (App., *infra*, 7).

It strongly appears that timely service was not made because Wall's counsel could not decide whether to pursue the case. If so, it is doubtful any district court would find that to be good cause, and it is certainly not a matter that warrants review by this Court.

CONCLUSION

For these reasons Rockwell respectfully requests the Court to deny the petition.

Respectfully submitted,

D. G. Ribble, Counsel of Record
Wilford H. Stone
of
Lynch, Dallas, Smith &
Harman, P.C.
526 Second Avenue SE
P.O. Box 2457
Cedar Rapids, IA 52406-2457
Telephone (319) 365-9101
Facsimile (319) 365-9512

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

RICHARD C. WALL, Plaintiff, vs. ROCKWELL INTERNATIONAL CORPORATION, Defendant.	)	No. C 91-0194 **AFFIDAVIT**

STATE OF IOWA)
) ss:
COUNTY OF LINN)

I, D. G. Ribble, on oath state:

1. After receiving Mr. Visser's letter dated August 6, 1992, (Exhibit C to plaintiff's brief), I obtained the information he requested.

2. The information required explanation to a person not familiar with Rockwell's records and I called Mr. Visser's office to arrange a meeting. Our office records show the following unsuccessful attempts by us to reach each other by telephone:

Tuesday, October 8, Ribble to Visser
Wednesday, October 9, Visser to Ribble
Thursday, October 10, Ribble to Visser
Friday, October 11, Visser to Ribble
Monday, October 14, Ribble to Visser
Wednesday, October 16, Visser to Ribble
Thursday, October 17, Ribble to Visser

Finally, Friday, October 18, I called Mr. Visser's secretary, and she made an appointment for me to see Mr. Visser at his office October 22. We met and I delivered to him and explained the information he requested.

3. At no time before Rockwell filed its motion to dismiss did I discuss with Mr. Visser the matter of service of summons. The decision to defer service was made unilaterally by plaintiff and was not the subject of any agreement between plaintiff and Rockwell.

4. At no time following Mr. McNett's letter dated August 5 to Mr. Visser (Exhibit B to plaintiff's brief) did I have authority to offer any different settlement suggestions or proposals, nor did I. Although Mr. Visser may have stated during our meeting October 22 that he wished the case could be settled, he never made a counteroffer in response to Mr. McNett's letter dated August 5. I had no communication with Mr. Visser after October 22 until I received the service copy of the resistance to dismissal he filed January 7, 1992.

/s/ D. G. Ribble
D. G. RIBBLE

Subscribed and sworn to before me March 10, 1992, by D. G. Ribble.

/s/ Lori S. Davisson
Notary Public in and for the
State of Iowa

[certificate of service deleted in printing]

MOYER & BERGMAN

ATTORNEYS AT LAW

[Law firm address and attorney names deleted in printing]

August 6, 1991

Mr. Donald G. Ribble
Attorney at Law
526 2nd Avenue SE
P. O. Box 2457
Cedar Rapids, IA 52406-2457

Re: Richard Wall v. Rockwell International
Dear Don:

Enclosed is a copy of the lawsuit filed on Dick Wall's behalf today in the United States District Court. I am forwarding this copy to you for your reference.

We have not yet made any decisions about when and whether to serve the Complaint, which I understand we need to do within 120 days.

In the meantime, Mr. Wall is considering the information that you have previously generated through Mr. McNett's letter and through our discussions.

One additional piece of fact information that Mr. Wall has asked that we elicit is this: Mr. Wall would like to know in the specific group of salaried employees in the engineering or professional area, what the age impact was. He feels this was the relevant group and believes that the statistics may not be quite so favorable when looking at

this limited group as opposed to the work force as a whole. Any information you could provide me in this regard might be very helpful in having me work with Mr. Wall for purposes of further evaluating the merits of his claim.

Very truly yours,

MOYER & BERGMAN
/s/ Kevin J. Visser
Kevin J. Visser

KJV/lac

cc: Richard Wall

MOYER & BERGMAN

ATTORNEYS AT LAW

[Law firm address and attorney names deleted in printing]

October 22, 1991

Mr. Richard C. Wall
5650 Colorado Drive S.W.
Cedar Rapids, IA 52404

PERSONAL AND CONFIDENTIAL

Dear Dick:

Attorney Ribble delivered to me the enclosed Summary Analysis of layoffs within the engineering department alone.

As you can see from the statistical breakdown, it appears that the company managed to keep the numbers fairly close in this respect as well.

I think we need to sit down and re-evaluate the status of the case, actions that may be taken, expenses, etc., no later than the middle of November.

Very truly yours,
MOYER & BERGMAN
Kevin J. Visser

KJV/lac

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

RICHARD C. WALL Plaintiff, vs. ROCKWELL INTERNATIONAL CORPORATION, Defendant.	NO. C 91-0194 APPLICATION IN RESISTANCE TO INVOLUNTARY DISMISSAL

COMES NOW the Plaintiff, Richard C. Wall, through his counsel of record, and states:

1. It is contrary to the interests of justice that this matter be involuntarily dismissed, as the merits of Plaintiff's claim will be compromised in so doing.

2. Plaintiff's primary claim is for age discrimination. This action was filed only shortly before the expiration of the statute of limitation for plaintiff's claim pursuant to 29 U.S.C. 621, et seq. A dismissal at this time will work to prevent a disposition of plaintiff's claim upon the merits.

3. The Complaint and Summons have not yet been formally served upon the Defendant. However, active discussions have been ongoing between counsel for the parties for the past 12 months, including an exchange of information as recently as late October. These efforts to

resolve Plaintiff's claim independently of the judicial system should be credited. The Defendant has been informally advised of the filing of the Complaint and has been provided with a copy of the pleading.

4. Counsel for the Plaintiff has only recently determined that it will be unable to continue in its representation of the Plaintiff. The Plaintiff wishes, in the strongest terms, to continue the prosecution of his claim.

5. It is respectfully submitted that the Plaintiff be granted 60 days in which to procure successor counsel to prosecute this claim.

Respectfully submitted,

MOYER & BERGMAN

By _____

Kevin J. Visser 000005739
2720 First Avenue NE
P. O. Box 1943
Cedar Rapids, IA 52406-1943
Telephone: (319) 366-7331

ATTORNEYS FOR PLAINTIFF